UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
PALM BEACH DIVISION

In re:

WILLIAM LAWRENCE LENEVE,

Debtor.
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CASE NO. 03-36439-BKC-PGH
Chapter 7

SONEET R. KAPILA, Chapter 7 Trustee

Plaintiff,
v.

WLN FAMILY LIMITED PARTNERSHIP, CARLAYNE HOLLOWAY, and LEE HOLLOWAY

Defendants.
_____/

ADV. NO: 04-3014-BKC-PGH-A

ORDER GRANTING TRUSTEE'S SECOND MOTION TO COMPEL GERALD R. MCKINNEY TO RELEASE DOCUMENTS CLAIMED AS PRIVILEGED

THIS MATTER came before the Court in West Palm Beach, Florida on November 19, 2004, at 10:30 am upon the *Trustee's Second Motion to Compel Gerald R. McKinney to Release Documents Claimed as Privileged* (the "*Motion*") filed by the Plaintiff, Soneet R. Kapila, Chapter 7 Trustee (the "Trustee"). By way of the Motion, the Trustee seeks the entry of an Order directing attorney Gerald R. McKinney ("McKinney") to release and produce certain documents which McKinney has declined to produce on grounds of attorney client privilege. The Court has reviewed and considered the Trustee's Motion and Memorandum of Law submitted in support of the Motion, McKinney's Response and supporting Memorandum of Law, a Privilege Log dated November 15, 2004, setting forth the documents which McKinney claims as privileged, as well as the arguments of counsel for the Trustee and McKinney. Based upon the foregoing review, the Court issues the

following Order directing that McKinney turn over to counsel for the Trustee those documents identified in Items One (1) through Six (6) of the Privilege Log, except those entries on his invoices which do not relate to real property located in North Carolina (the "Banner Elk property").

In the present adversary proceeding, the Debtor has invoked the attorney-client privilege to prevent McKinney from turning over documents related to a real estate transaction involving an alleged fraudulent conveyance from the Debtor to the Defendants. "A 'privilege' is a rule which permits the exclusion of evidence in order to protect an interest or relationship." *White v. Williams (In re Williams)*, 152 B.R. 123, 127 (Bankr. N.D.Texas 1992). The attorney-client privilege protects a client in his dealings with counsel. *Id.* The protection afforded by the privilege encourages "full and frank communications" between an attorney and the client. *Upjohn v. United States*, 449 U.S. 383, 389 (1981). This protection from the disclosure of confidences allows attorneys to provide sound legal advice to clients without fear that those confidences will be divulged. *See Fisher v. United States*, 425 U.S. 391, 403 (1976). However, the protection afforded by the attorney-client privilege may obstruct the search for truth; hence, "it should be strictly construed and applied only where necessary to ensure fully informed legal advice." *In re Eddy*, 304 B.R. 591, 596 (Bankr. D.Mass. 2004) (citing *Fisher*, 425 U.S. at 403).

Moreover, the party claiming the privilege must establish its applicability. *Foster v. Hill (In re Foster)*, 188 F.3d 1259, 1264 (10th Cir. 1999). Courts look disfavorably on blanket assertions of privilege, and instead demand that the privilege must be asserted on an item-per-item basis. *Id.* In this case, McKinney asserts the attorney-client privilege with regard to a series of documents purportedly related to exchanges between McKinney and the Debtor.

In a typical case outside of bankruptcy, the privilege belongs only to the client, and cannot be unilaterally waived by the attorney. *French v. Miller (In re Miller)*, 247 B.R. 704, 708 (Bankr. N.D.Ohio 2000) (citing *Moore v. Eason (In re Bazemore)*, 216 B.R. 1020, 1023 (Bankr. S.D.Ga. 1998)). The attorney-client privilege changes somewhat in bankruptcy. *Eddy*, 305 B.R. at 596. In exchange for the possibility of discharging their debts, and staying creditor efforts to collect these debts, debtors are required to disclose all of their assets and liabilities. *Id.* (citing *U.S. v. White*, 950

F.2d 426, 430 (7th Cir. 1991); *In re French*, 162 B.R. 541, 548 (Bankr. D.S.D. 1994)). Accordingly, "the information disclosed to an attorney for the assembly of a bankruptcy petition and schedules does not fall within the scope of the attorney-client privilege." *Id.* (citing *White*, 950 F.2d at 430; *French*, 162 B.R. at 548). In addition, the bankruptcy trustee succeeds to many of the interests of the debtor including the right to avoid fraudulent conveyances of the debtor's assets. *See Miller*, 247 B.R. at 708.

As a threshold matter, the Court notes that under Bankruptcy Rule 9017[1] and the Federal Rules of Evidence[2] privileges in federal courts, such as the attorney-client privilege, are governed with reference to the federal common law unless the State law supplies the rule of decision. *Miller*, 247 B.R. at 708; *Value Property Trust v. Zim Company (In re Mortgage & Realty Trust)*, 212 B.R. 649, 651-52 (Bankr. C.D.Cal. 1997). This is not a diversity action where privileges are determined under applicable state law. *Mortgage & Realty Trust*, 212 B.R. at 652 (citing Fed.R.Evid. 501). This is an action to turnover records to the Trustee concerning a possible fraudulent transfer of the Debtor's real property. Because the Trustee's Motion concerns the turnover of information related to estate assets, federal law applies. *See Bazemore*, 216 B.R. at 1023; *Mortgage & Realty Trust*, 212 B.R. at 652. "Moreover, the question of privilege asserted in bankruptcy court is a procedural question and existing federal law is to be used." *Bazemore*, 216 B.R. at 1023 (citing *In re*

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[1]Rule 9017 of the Federal Rules of Bankruptcy Procedure provides in part: "The Federal Rules of Evidence . . . apply in cases under the [Bankruptcy] Code."

[2]Rule 501 of the Federal Rules of Evidence, sets forth the rules of evidentiary privilege as they are to be applied in federal courts. Rule 501 provides in part that:

> [T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

International Horizons, Inc., 14 B.R. 199 (Bankr. N.D.Ga. 1981), *aff'd*, 16 B.R. 484 (N.D.Ga. 1981), *aff'd*, 689 F.2d 996 (11th Cir. 1982)).

The power of a trustee to waive unilaterally the attorney-client privilege in the case of a corporate debtor was settled by the Supreme Court in *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 356 (1985). In *Weintraub*, the Supreme Court held that a trustee of a corporate debtor in bankruptcy under Chapter 7 has the power to waive the attorney-client privilege for the bankrupt company because the trustee succeeds to the fiduciary and management duties toward the company that management formerly held. 471 U.S. at 356-58. However, the Supreme Court explicitly avoided applying its holding to individual debtors, saying "our holding today has no bearing on the problem of individual bankruptcy, which we have no reason to address in this case." *Id.* at 356. In this case, the Court is not faced with a trustee's decision to waive the privilege over a corporate debtor, but instead the Court must tread into the more uncertain terrain of the trustee's power to waive the privilege of an individual debtor over the debtor's objection.

In the wake of *Weintraub*, some courts have held that trustees for individual debtors have the power to waive the privilege for the debtor where the benefit to the entire bankruptcy estate outweighs the potential harm to the individual. *See, e.g., Eddy*, 304 B.R. at 599 (holding that trustee may waive privilege held by individual debtor in converted Chapter 11 case so long as disclosed communications relate to the administration of property of the estate); *Foster*, 188 F.3d at 1266 (assuming for purposes of appeal that trustee may control an individual debtor's privilege where balance of factors favors trustee); *Ramette v. Bame (In re Bame)*, 251 B.R. 367, 375 (Bankr. D.Minn. 2000) (holding that trustee succeeded to privilege regarding all communications that regarded estate administration and took place while debtor was debtor-in-possession); *Miller*, 247 B.R. at 710 (recognizing power of trustee to waive privilege in appropriate cases but finding factors weighed in favor of denying exercise of power in that case); *Bazemore*, 216 B.R. at 1025 (finding that trustee holds right to waive privilege where estate holds causes of action for bad faith and malpractice in state court case which judgment precipitated debtors' bankruptcy); *Williams*, 152 B.R. at 129 (holding that trustee could waive privilege when pursuing avoidance causes of action to augment

estate). Other courts have denied a trustee's attempts to waive the privilege when held by an individual debtor. *See, e.g., In re Tippy Togs of Miami, Inc.*, 237 B.R. 236, 239 (Bankr. S.D.Fla. 1999) (holding that debtor held privilege as individual and not representative of corporation, so bankruptcy trustee could not waive privilege at meeting wherein corporate and personal matters were discussed); *In re Silvio De Lindegg Ocean Developments of America, Inc.*, 27 B.R. 28, 28 (Bankr. S.D.Fla. 1982) (holding that trustee cannot waive an individual's attorney-client privilege). This Court is persuaded that the correct approach is the one utilized by those courts employing the balancing approach. Therefore, the Court will weigh the interests of the Debtor's estate against the potential harm to the Debtor if the Trustee is allowed to waive the privilege.

The Court finds that the case-by-case balancing approach is the most appropriate approach to utilize when a trustee seeks to waive the attorney-client privilege on behalf of an individual debtor because the consequences of adopting a *per se* rule are intolerable. A *per se* rule universally allowing trustees to waive the privilege on behalf of individual debtors would grant trustees a power beyond that envisioned in the Bankruptcy Code. The trustee's power over the debtor is not limitless. *Miller*, 247 B.R. at 709. For instance, the trustee has no power to determine how a debtor manages his day to day affairs. *Id.* (citing *In re Hunt*, 153 B.R. 445, 453 (Bankr. N.D.Tex. 1992)). Under the Bankruptcy Code, the trustee is the representative and administrator of all the property that comes into the debtor's bankruptcy estate. *Id.* (citing 11 U.S.C. §§ 323(a) and 541(a)). There is no theory of property that includes an inchoate "privilege" as an alienable commodity that can be bought, sold, or transferred by mere operation of law to a trustee in the same way as any other asset of the estate. *See id.*; *see also Williams*, 152 B.R. at 127 (defining privilege as a "rule" that concerns evidence). Waiving a privilege can act as a key to unlocking information that leads to avoidance actions or some other valuable asset to bring into the estate, but a privilege *qua* privilege has no monetary value. Moreover, a *per se* rule in favor of granting trustees the power unilaterally to waive the privilege could allow trustees to "inquire into all the prepetition communications the debtor ever made with an attorney, regardless of whether such matters had anything to do with the related

bankruptcy proceeding." *Miller*, 247 B.R. at 709. Such a rule could also adversely affect the debtor's Fifth Amendment rights against self-incrimination.

Conversely, a *per se* rule prohibiting trustees from unilaterally waiving the attorney-client privilege on behalf of individual debtors in all circumstances would pose an intolerable obstacle to trustee investigations seeking to secure or recover valuable assets of the debtor's bankruptcy estate. The trustee has a duty to maximize estate assets for the benefit of creditors and the debtor. Furthermore, the Bankruptcy Code envisions a scheme whereby debtors must "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under [the Bankruptcy Code]." 11 U.S.C. § 521(3). In addition to turning over property of the estate to the trustee, the debtor must also surrender "any recorded information, including books, documents, records, and papers, relating to property of the estate . . ." 11 U.S.C. § 521(4). The Bankruptcy Code clearly envisions the free flow of information between the debtor and the trustee in the course of maximizing the recovery of assets of the estate to be liquidated and distributed to creditors.

If individual debtors were allowed monopolistic control over the privilege, excluding the crime-fraud exception, they could thwart investigations into alleged fraudulent conveyances. *See Bazemore*, 216 B.R. at 1025 (citing *Weintraub*, 471 U.S. at 353-54). In the context of management controlling the attorney-client privilege in cases of corporate debtors, the Supreme Court stated: "[t]he Code's goal of uncovering insider fraud would be substantially defeated if the debtor's directors were to retain the one management power that might effectively thwart an investigation into their own conduct." *Weintraub*, 471 U.S. at 353-54. Likewise, individual debtors should not retain exclusive control over disclosures that, if revealed, could detail fraudulent conduct by the individual debtors or their attorneys. *See, e.g., Bazemore*, 216 B.R. at 1025 (concluding that information that could lead to malpractice action against debtors' attorney justified waiver).

Those Courts that have employed a balancing test in determining whether the trustee can unilaterally waive the attorney-client privilege have followed the *Bazemore* court, which stated that:

> The inquiry [into whether the trustee may unilaterally waive the attorney-client privilege held by an individual debtor] requires balancing the interests of a full and frank discussion in the attorney-

> client relationship and the harm to the debtor upon disclosure with the trustee's duty to maximize the value of the debtor's estate and represent the interests of the estate.

216 B.R. at 1024 (citing *Weintraub*, 471 U.S. 343). Accordingly, this Court will employ the balancing test announced in *Bazemore*, and weigh the policy protecting attorney-client information and potential harm to the Debtor upon disclosure against the value to the Debtor's estate that disclosing the Debtor's attorney-client communications, as to an alleged fraudulent conveyance, could yield.

While the Court is mindful of the public policy protecting attorney-client communications, given that such privilege "serves not to enlighten but rather to obscure the truth," the party asserting the privilege has "the burden to prove that the specific communication or documents sought to be discovered fall within the protection of the attorney-client privilege." *Hillsborough Holdings Corp. v. Celotex Corp. (In re Hillsborough Holdings Corp.)*, 118 B.R. 866, 869 (Bankr. M.D. Fla. 1990) (citing *In re Grand Jury Investigation,* 842 F.2d 1223, 1225 (11th Cir. 1987); *In re Grand Jury Subpoena*, 788 F.2d 1511-12 (11th Cir. 1986)).

In this case, the Trustee has moved for production of documents that involve alleged fraudulent transactions concerning the Banner Elk property. McKinney has asserted that the attorney-client privilege applies to the requested documents because these documents were either delivered to him by the Debtor, or detail communications between McKinney and the Debtor for the purpose of legal opinions. McKinney has submitted a Privilege Log describing the contested items, and the Court has inspected the six items, or six groups of documents, by means of an *in camera* review.

In this adversary proceeding, the Trustee is seeking to avoid alleged fraudulent transfers of a substantial asset to the Defendants. The Court finds that the potential benefit to the estate in placing the privilege in the hands of the Trustee outweighs the potential harm both to the Debtor and to his communication with his attorney, McKinney. The Court notes that the Trustee only seeks information that could lead to the recovery of the alleged fraudulent conveyance of the Banner Elk property from third parties. The Debtor has not asserted the possibility that the Trustee's avoidance action will be used to prosecute the Debtor for criminal violations of the Bankruptcy Code. *See Miller*, 247 B.R. at 710. This case is more like *Williams* in which the Trustee was investigating pre-petition transfers to the debtor's family. 152 B.R. at 126-28. The *Williams* court stressed that the Bankruptcy Code does not protect a debtor's insiders or affiliates from avoidance litigation, but instead creates causes of action to avoid transfers to insiders. *Id*. at 129.

The Court is mindful that the Trustee and the Debtor are in an adversarial relationship in this case. *See Miller*, 247 B.R. at 710 (citing *In re Rice*, 224 B.R. 464, 471 (Bankr. D.Or. 1998)). There is no question that in this case the Debtor has defied his duty to the Trustee and failed voluntarily to produce books and records or answer questions about his assets. However, the adversarial nature of the relationship can cut against the Debtor as well because to deny the Trustee the power to waive the privilege merely because he is adversarial to the Debtor would always protect debtors when they are in the best position to know the substance behind allegations of fraud. The Debtor no longer holds title to the Banner Elk property, so he will not suffer any damage as a result of the Trustee waiving the privilege. Indeed, as the recovery of the allegedly fraudulent transfers is from the Defendants, the Debtor's interest in maintaining the privilege is even less compelling. The Court

finds that the Debtor's consistent refusal to share information with the Trustee throughout this case necessitates that the Trustee control the right to waive the privilege.

The Trustee seeks to waive the privilege with regard to all of the documents in the Privilege Log. Since the Court holds that the Trustee controls the privilege, the Court will now determine whether the Trustee can waive the privilege as to each item in the Log. As a result of its *in camera* review, the Court concludes that there are several items to which no privilege attaches. The attorney-client privilege does not attach to the deeds executed between the Defendants in this adversary proceeding that concern the Banner Elk property. Since the deeds are the record of transactions either between two third parties, or between one of the Defendants and a third party, there is no credible ground upon which the Debtor can claim that these items are privileged communications between himself and McKinney. The items do not become cloaked in privilege merely because the Debtor delivered them to McKinney. Therefore, the deeds, items one (1) and two (2), are freely discoverable, and the Trustee need not claim the privilege, then waive it in order to obtain these documents. The remaining four items range from handwritten notes to computer generated invoices. Item three (3) is a handwritten note presumably referring to the Debtor. Item four (4) is a series of invoices compiled by McKinney for legal work on the Debtor's behalf. Item five (5) is a fax from McKinney to the Debtor concerning billings. And item six (6) is a handwritten faxed note asking for McKinney's opinion concerning invoices from the Elk River Club. Item six also includes invoices to the Debtor from the Elk River Club. The invoices included in item six are not privileged. Like items one and two, the invoices in item six were merely delivered to McKinney, and not prepared by him in consultation with the Debtor. The invoices in item six are freely discoverable.

For the remaining items, after balancing the interests of the Debtor with the interests of the trustee in recovering an alleged fraudulent conveyance, the Court finds that the Trustee controls the privilege as to those documents identified in the Privilege Log from or to the Debtor and the WLN Family Limited Partnership which relate to transactions or matters involving the Banner Elk property and other personal property which is the subject of this adversary proceeding. Therefore, the Trustee can waive the privilege with regard to those items. However, the Trustee cannot waive the privilege with regard to invoices and other documents that involve McKinney's work for the Debtor that does not involve the Banner Elk property.

Conclusion and Order

Accordingly, the Court having made the foregoing findings of fact and conclusions of law, and being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. That the Trustee's Second Motion to Compel Gerald R. McKinney to Release Documents Claimed as Privileged to Trustee is **GRANTED**.

2. That Attorney McKinney shall produce and release to counsel for the Trustee prior to his scheduled deposition in this adversary proceeding those documents identified in Items 1 through 6 of his Privilege Log, provided however, that Attorney McKinney shall not be required to produce or disclose any portions of his invoices for services rendered to the Debtor, William Lawrence LeNeve, which do not relate to transactions or matters involving the Banner Elk property and other personal property which is the subject of this adversary proceeding.

ORDERED in the Southern District of Florida on December 22, 2004.

HONORABLE PAUL G. HYMAN, JR.
UNITED STATES BANKRUPTCY JUDGE